

IN THE APPEAL COURT OF LESOTHO

**C OF A (CIV) NO. 34/2019
CIV/APN/333/2018**

HELD AT MASERU

In the matter between:

PRIME MINISTER	1ST APPELLANT
PRINCIPAL SECRETARY TO CABINET	2ND APPELLANT
PUBLIC SERVICE COMMISSION	3RD APPELLANT
ATTORNEY GENERAL	4TH APPELLANT

and

TEKO MOLOTSI	1ST
RESPONDENT	
TSIETSI PHENETHI	2ND
RESPONDENT	
LISEMA MALEFANE	3RD
RESPONDENT	
TSÓLO KOEPE	4TH
RESPONDENT	

Coram: Damaseb AJA, Chinhengo AJA et Mtshiya AJA

DATE HEARD: 12 May 2020 (For determination by way of written submissions in terms of the CA President's COVID 19 PD 2020).

DATE DELIVERED: 29 May 2020

Summary

The respondents in this appeal are ex members of the Lesotho Liberation Army (LLA) who were employed in the public service on fixed terms contracts (of 36 months) as compensation for their contribution to the freedom struggle of Lesotho. Their identical employment contracts include, amongst others, a term that the Government may terminate their employment at any time either on three months' notice or on payment of three months' salary in lieu of notice. A further term of the employment contract is that if the contract is terminated by the Government before the 36 months run out, the employee shall be paid a gratuity of 25 percent of aggregate remuneration for the period served.

The Government terminated the contracts two years before the term of 36 months ran out by giving the employees three months' notice. The employees then brought proceedings to declare the termination of their employment contracts unlawful and demanded to be paid for the remainder of the contract period. The Government pleaded that the employees were terminated because they had reached the mandatory retirement age of 60 years in terms of s 26 of the Public Service Act 2005 (PSA). The employees retorted that they were appointed on contract which is permissible in terms of s 7 of the PSA.

The High Court found in favour of the employees. On appeal by the Government, the Court Appeal held that contract appointment to the Lesotho public service was permissible both in terms of the PSA and the Constitution. That the appointment of the employees was agreed to be compensation for their contribution to the struggle and that the premature termination of their employment contracts constituted reduction in compensation. Since the appeal lodged about five months after judgement of the High Court and there being no satisfactory explanation for delay and no prospect of success, appeal struck from the roll with costs.

JUDGEMENT

PT DAMASEB AJA:

[1] The main issue in this appeal is whether employment contracts concluded between the Government of Lesotho (Government) and some former members of the Lesotho Liberation Army (LLA) were lawfully terminated by the Government.

[2] Moiloa J decided in favour of the former LLA members and aggrieved by that decision the Government appealed to this court. The High Court's order was handed down on 29 October 2018 and ought to have been appealed within six weeks¹ of that date. The notice of appeal was however only filed on 15 May 2019. It was therefore out of time for about five months. The Government seeks condonation for the late prosecution of the appeal.

[3] In such an application, it is trite, the applicant for condonation must provide a satisfactory explanation for the delay and also demonstrate that it has good prospects of success on the merits. I propose to first deal with the prospects of success and thereafter with the reasonableness of the delay. If the prospects are bad, the condonation application will be refused and the matter struck off the roll if there is no reasonable and satisfactory explanation for the delay.

Litigation history

[4] The matter started as an urgent application brought by the present respondents (as applicants) before Moiloa J who,

¹ In terms of Rule 4(1) of the Court of Appeal Rules.

after hearing the parties, first granted interim relief in the terms sought in the notice of motion and, on 29 March 2018, granted a final order declaring unlawful the termination by the Government of the applicants' employment contracts within the public service. Henceforth the respondents in the appeal will be referred to as 'applicants'.

[5] The applicants' grievance stemmed from the termination of their contracts of employment within the Office of the Prime Minister of Lesotho (OPM). They are veterans of Lesotho's liberation struggle waged by the LLA. As more fully set out below, the applicants were employed on the strength of a Cabinet decision recognising their special status as ex-members of the LLA.

Common cause facts

[6] On 5 August 2016, the applicants signed separate but identical contracts of employment with the second respondent as Principal Secretary to the Cabinet. On the strength of those contracts, the applicants were employed as 'Reconciliation Officer in the Public Service of Lesotho for the term of his/her engagement'.

[7] Amongst others, the following terms were incorporated into the applicants' employment contracts:

- (a) The engagement 'shall be for the period of 36 months continuous service' and the 'contract may be extended or renewed';
- (b) The Government may terminate the engagement or dismiss the employee from the service 'after due process of the law' on the ground of misconduct;
- (c) The Government may at any time terminate the employment contract by giving the employee three months 'notice in writing or on paying him/her three months' salary in *lieu* of notice' (clause 6.2);
- (d) On the satisfactory completion of 36 months service or such shorter period if the contract is terminated, the employee is eligible for 'gratuity of 25% of the amount of aggregate of salary drawn during' that period (clause 9).

[8] On 25 July 2017 the applicants received a letter from the Cabinet Office informing them that their contracts would be terminated effective October 2017. That was a notice period of three months, ostensibly in accordance with clause 6.2 of the employment contract.

Founding Affidavit

[9] In the founding affidavit on behalf of the applicants, Mr Teko Molotshi, an ex- LLA member, states the following in support of the relief they sought in the notice of motion. That the applicants did not accept the termination of their employment in the OPM and tried to negotiate that they be paid the remainder of the contract period of 2 years but the Government refused. The positions of reconciliation officer to which the applicants were appointed were specially created to 'compensate' former LLA members for their involvement in the liberation struggle. The positions were created by a Cabinet decision *C3 (2009) Pm/STF13*. Since the appointments were intended to 'compensate' the employees for their involvement in the liberation struggle, they were not expected to be retired upon reaching the statutory retirement age. On 27 April 2018

the respondents 'forced' the applicants to sign contracts (styled the 'Addendum') purporting to vary their employment contracts and 'threatening' that if they did not sign they would not receive their terminal benefits. The Addendum was concluded eight months after the applicants' employment was terminated.

Opposition

[10] Ms Mataeli Sekantso, in her capacity as the Principal Secretary (PS) in the OPM, deposed to the answering affidavit on behalf of the respondents. She admits the manner in which the applicants were appointed and the terms of the contracts. She asserts, however, that the contracts were by mutual agreement varied in writing by the Addendum in April 2018. Accordingly, the deponent denies that the appellants were not consulted before the termination of their employment contracts. The PS relies on the Addendum which in relevant part reads:

"Government and the person engaged agree as follows:

- 1. Amend clause 6(2) of the Schedule to the agreement to read as follows:*

6(2) The Government may at any time terminate the engagement of the person by giving him/her one month's notice in writing or on paying him/her one month's salary in lieu of notice".

(I pause to reflect that the Addendum was signed on 27 April 2018 with each of the applicants whereas the employment contracts were terminated in August 2017. The PS makes no effort to explain the obvious, if curious discrepancy in timing).

[11] The PS denies that the applicants were not paid their gratuities and relies on payment vouchers generated in June 2018 in favour of the Applicants. (It bears mention that these payments occurred close to a year after the applicants' termination and only after the Addendum was concluded. Against that backdrop, the PS, again, makes no effort to explain the discrepancies and the long gap between the date of termination and the date of payment).

[12] The PS denies the existence of a Cabinet decision in the terms alleged by Mr Molotsi on behalf of the applicants. According to her, the 'Applicants were made to retire at the age of 60 years according to the new Public Service Act of 2005'. As

for the Addendum, the PS states that its terms and 'need' were explained to the applicants and that they signed same without objection.

[13] According to the PS, every reconciliation officer appointed on contract who had reached the age of 60 years signed the Addendum and after termination were all paid their gratuities.

[14] It will be recalled that Mr Molotsi pertinently alleged that the position of reconciliation officer was created as a special dispensation for ex-LLA members as compensation.² That allegation is traversed as follows by the PS in para 9 of her answering affidavit:

"Contents noted save to state that the said position of Reconciliation Officers have re-designed (*sic*) to serve the Ministry or office strategic objectives'.

[15] In the manner that the PS dealt with the applicants' foundational premise, the following conclusions are unavoidable. That it is admitted that the applicants'

² *Vide* para 13 of the founding affidavit deposited by Mr Teko Molotsi on behalf of the applicants.

appointment in the Lesotho public service was considered as a special case. That the appointments were made for a specific period of time (36 months) as compensation for services rendered in the liberation struggle.

Reply

[16] In reply, Mr Molotsi on behalf of the applicants attached the Cabinet Memorandum by the OPM on which they relied. The Cabinet memorandum bears the same reference quoted by Mr Molotsi in his founding affidavit. Not surprisingly, at the hearing no objection was taken by the respondents to its production in reply as no reference to such objection appears in the written judgment of Moilola J.

[17] The memorandum by the Prime Minister records, amongst others:

“(a) That Officers listed in annex 1 (EX-LLA members) be absorbed to the vacant positions of Reconciliation Officer, Grade E;

...

(2) Cabinet may wish to note further that those positions [of Reconciliation Officers] were created to give employment to the EX-LLA members as a form of compensation for their involvement in the liberation struggle." (My underlining)

Proceedings in the High Court

[18] On 29 October 2018, Moiloa J gave a final order in the following terms:

- (a) The decision of the 1st Respondent to terminate Applicants' employment contracts with 1st and 2nd Respondents is hereby declared null and void *ab initio* and has no effect in law.
- (b) The 1st and 2nd Respondents are hereby directed and ordered to pay Applicants' salaries for two (2) years remaining period of their contracts without any loss of benefits together with interest thereof (sic) at 6.5% per annum;
- (c) The Respondents are hereby ordered to pay costs of suit."

[19] I will briefly set out the reasons the High Court gave for its order. Moiloa J held that:

- (a) In 2009 the Cabinet of Lesotho created in the public service the positions of reconciliation officer to give employment to ex-LLA members as a form of compensation and reintegration into normal society.
- (b) When the applicants were engaged, the Public Service Act 1 of 2005 was already operational and that Act applied to the applicants as they were appointed on contract into the public service by the 3rd Respondent.
- (c) Although under the Public Service Act the retirement age is 60 years, it was considered that at the time of their engagement, in the case of the applicants 'some if not most of them' were already above the age of 60 years. Therefore, in order to accommodate them, the 'Government of Lesotho exempted

applicants from this statutory
age of retirement’.

- (d) The 2nd respondent ‘unilaterally’ terminated the applicants employment contracts.
- (e) The 2nd respondent did not give ‘notice’ to the applicants but instead informed them that their employment contracts were terminated as they had reached 60 years or above.
- (f) Since no notice was given to the applicants, the respondents are ‘estopped’ from terminating the applicants; and that at all events the argument that the applicants were given notice ‘carries no merit’ because the applicants were appointed on fixed term contracts and the manner of their termination was ‘without prior consultation’ with applicants.
- (g) According to the learned judge, relying on ***Buthelezi v Municipal Demarcation Board [2005] 2 BLR 115 (LAC)***:

'a party to a fixed term contract has no right to terminate such contract in the absence of repudiation or material breach of the contract by the other party'.

- (h) That before termination of a fixed term contract, *audi* had to be observed.

[20] The High Court next dealt with the respondents' defence that the applicants agreed to the variation of their contracts of employment. The court did not find merit in the defence because the termination pre-dates the Addendum. As the learned judge observed:

To compound the mess in which they had put themselves Respondents purported to amend the period from three (3) months to one (1) months' notice. In my view the Addendum smacks of malice.

[21] According to Moiloa J, the Addendum was irrelevant and does not answer the applicants' complaint that they were not consulted before termination.

[22] The learned judge held that the PS was not competent to terminate the applicants as they were employed by the Public Service Commission in terms of the Lesotho Constitution.³ The High Court therefore concluded that the applicants' termination was unlawful, both 'procedurally and in substance'.

[23] As for the payments made to the applicants, according to Moiloa J, they amounted to gratuities which were due to them for the period served up to their termination in terms of clause 9 of the employment contract and that those payments did not 'correct the fact that the employment contracts were terminated unlawfully'. The court held that the contracts still had two years to run when they were 'prematurely' terminated and that, under the circumstances, the respondents are 'obliged' to pay to the applicants their salaries for the balance of their contracts.

The appeal

[24] The Government relies on the following grounds of appeal in its notice of appeal. The appointments of the applicants were

³ Section 137(1) of the Constitution states: 'Subject to the provisions of this Constitution, the power to appoint persons to hold or act in offices in the public service ..., the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Public Service Commission'.

subject to the Public Service Act 1 of 2005 which requires that a public servant 'shall' retire at the age of 60 years. The High Court therefore misdirected itself by holding that it was competent for the applicants to be retained in employment after they had reached the age of 60 years.

[25] The High Court fell into error in holding that the applicants still had two years of unexpired employment contracts when those contracts were terminated in compliance with the terms of the contract. The High Court accordingly was wrong in ordering the respondents to pay to the applicants salaries for two years 'without loss of benefits'.

[26] The agreement between the applicants and the Government gave the latter the 'discretion' to cancel the applicants' contracts of employment 'upon three months' notice and that such notice was in fact given. In so far as the High Court came to a contrary conclusion, it misdirected itself.

[27] The gravamen of the Government's case advanced in the written submissions is twofold. The first is that the applicants had reached the age of 60 years and that the termination letters only gave effect to the prescripts of the law. In terms of s 26 of the Public Service Act 1 of 2005:

'(1) A public officer shall retire from the public service and shall be so retired on attaining the age of 60 years.' (My underlining)

[28] The second leg of the Government's case is predicated on clause 6.2 of the employment contract in terms whereof the parties contracted that 'The Government may at any time terminate the engagement of the person by giving him/ her three months' notice in writing or on paying him/her three months' salary in lieu of notice.' The Government states that the applicants were given three months' notice and by so doing the Government complied with the terms of the contract of employment.

[29] From the answering affidavit, the grounds of appeal and the written submissions three main defences are discernible. The first is that the applicants, by signing the Addendum, agreed to early retirement before their contract terms ran out. Secondly, that the Government terminated the contracts of employment on three months' notice in terms of clause 6.2 of the employment contract. Thirdly, that the termination occurred by operation of law in that the applicants had reached the age of 60 and, being public servants, were required to retire at the statutory age of retirement in terms of s 26 of the PSA 2005.

Analysis

[30] The applicants' case is that they were appointed on contract for three years as a form of compensation for their contribution to Lesotho's liberation struggle and that when the appointments were done the appointing authority knew that they were above retirement age or close to it. The High Court's findings to that effect are not challenged on appeal. The effect of that is that we must accept as established on the papers that in case of some of the applicants, they had already attained the age of sixty when the employment contracts were concluded. The OPM's memorandum which formed the basis for the Cabinet decision constitutes compelling corroboration of the applicants' version of the special dispensation approved by the Government for those who made sacrifices for the country's liberation.

[31] Section 7(1) of the PSA 2005 states:

'Appointments to the public service shall be on-

(a) permanent and pensionable terms;

(b) contract terms

(c) temporary terms;

(d) *casual labour terms.*' (My underlining for emphasis).

That shows that it was, as alleged by the applicants, perfectly legal for them to be appointed on contract. The question is, could they be appointed or continue in service on contract beyond the age of 60 years? The various defences will now be considered.

[32] The Government's case that by signing the Addendum the applicants agreed to premature termination and that they accepted payment therefor faces insurmountable obstacles. In the first place, the Addendum was executed 8 months after the termination. There is therefore no causal link between the terminations and the Addendum. The PS failed to provide any explanation on oath for this discrepancy. The version of the applicants therefore stands on the applicable test in motion proceedings.

[33] Besides, the applicants allege that they were coerced into signing the Addendum. The common cause facts support that version. They were terminated in August 2017, yet they

received what purport to be their terminal benefits only in June 2018. Why? The PS does not explain! On the contrary, according to Mr Molotsi, at the time that the applicants were presented with the Addendum they were in dire straits financially - leaving them no choice but to sign the Addendum in order to get some reprieve. That version is corroborated by incontrovertible documentary evidence. The Addendum was signed in April 2018 and the payments made just a month later in June. If the payments were in furtherance of the mutual agreement to terminate the applicants, why were the payments not made soon after August 2017? The PS offers no explanation and I can't think of any plausible explanation that emerges from the papers. The totality of admitted facts and the surrounding circumstances lead to the inescapable inference that the payments were being withheld to induce the applicants to sign the Addendum in order to serve as after the fact rationalisation for the applicant's premature termination.

[34] On the effect of clause 6.2 of the employment contract, the Government's argument is confusing, to say the least. In the first place it argues that clause 6.2 of the agreement

entitled it to terminate the applicants as long as either of the preconditions in that sub-clause was complied with. But it then states that the reason it employed clause 6.2 was to comply with s 26 of the PSA 2005. As counsel argues in para 8.5 of the written submissions:

'Consequently, the reason for termination is clear. Much as the [Government] effected the termination in terms of the contract, the reason was to give effect to the law and that is manifest in the fact that only reconciliation officers who had reached the age of 60 years were selected.'

[35] Elsewhere counsel argues that the 'age of retirement is a matter of law provided for by the Public Service Act which is even put in peremptory terms'.

[36] What becomes clear then is that the applicants were terminated because they reached 60 years and not because the Government for some other reason wanted to exercise clause 6.2 of the employment contract. That raises the question whether the reason the Government gives for the termination is sustainable in law? We have already seen that s 7 of the of the PSA 2005 allows appointments in the public service on contract.

[37] In other words, the PSA allows both permanent and on contract appointments into the public service of Lesotho. I have had regard to Chapter XIII of the Constitution and it does not prohibit the appointment on contract of a person into the public service who is above the age of 60 years.

[38] Retirement has certain legal consequences. It involves an employee's entitlement to pension⁴, medical aid and the right to progression in the service through promotion, to mention only a few. Once a public servant reaches the age of 60, the Government's obligations to continue to make the employer's contributions towards pension and medical aid would cease. A public servant cannot therefore claim, as of right, to continue to remain in service, with the concomitant obligation on the Government. The fact that the PSA 2005 provides for a mandatory retirement age should be seen in that context and not that it prohibits on contract appointment into the public service of persons above 60 years.

[39] There are sound public policy reasons why such a practice should be possible. You may have a situation where in

⁴ Vide s 7(1)(a) of the PSA 2005.

a public health emergency such as Covid-19 Government may want to recruit persons above 60 as nurses and doctors on contract to render important public services. What is the public policy consideration to make that impossible? In my view none. In fact, the opposite is in the greater public interest. I therefore reject the argument that it is legally impermissible for a person to serve on contract in the public service of Lesotho above the age of 60 years.

[40] Absent a valid reason for the termination of the applicants in terms of the PSA 2005, we return to the terms of the contract. It will be recalled that the Government's reliance on clause 6.2 was predicated on the applicants having attained the age of 60 years. Since clause 6.2 on Government's own version was not relied on as a stand-alone ground for termination, it is unnecessary to decide if that clause would have entitled the Government to terminate the applicants' employment without the observance of *audi*.

[41] The employment of the applicants was a form of compensation. Terminating their employment prematurely was

therefore to reduce the compensation to which they were entitled. The termination was therefore unlawful.

[42] The High Court was therefore correct in concluding that the Government of Lesotho unlawfully terminated the applicants' employment contracts in August 2017 and that the applicants are entitled to remuneration for the unexpired portion of the 36 months for which they were appointed as reconciliation officers in the OPM. In my view, there are no prospects of success on the merits.

[43] Had the applicants accepted the termination in August 2017, they would have been entitled to the payment of a gratuity for the time served in terms of clause 9 of the employment contract which, in relevant part, states:

'On the satisfactory completion of Thirty-Six (36) months service or such shorter period if this contract is terminated under the provisions of clause 5(1) or 6(2), the person engaged shall be eligible for gratuity of twenty-five (25%) of the amount of aggregate of salary drawn during that period.'

[44] The High Court correctly held that the payment the applicants received in June 2018 constitutes gratuity for the period they served prior to their termination in August

2017. The High Court only ordered payment of salaries (without gratuity) for the remainder of the period of engagement - a finding that has not been cross-appealed and therefore stands.

The interest

[45] The High Court granted interest to the applicants on the sums due and payable at the rate of 6.5 percent, being the published Bank Of Lesotho *repo* rate following a similar approach by this court in **Xing Long Enterprise (Pty) Ltd v Zhong Sing (Pty) Ltd and another C of A (CIV) 61/2016**. Neither party has challenged that conclusion and I cannot think of any reason why the court's order on interest must not stand.

Condonation and points *in limine*

[46] It is common cause that the notice of appeal was filed of record on 15 May 2019 while the court's final order (it appears without reasons) was handed down on 29 October 2018 - about five months later. The appeal should have been noted within six weeks of the order being granted. The Government therefore seeks condonation for the late prosecution of the appeal. The condonation application is opposed.

[47] The Government's counsel of record deposed to an affidavit in support of the application for condonation wherein he sets out the efforts made to obtain the reasons for the court's order to enable him note the appeal. It is apparent from his affidavit that another practitioner in the Law Office who had since joined the OPM was previously seized with the matter before the present counsel of record was instructed to deal with the matter. The deponent in support of the condonation application does not explain why the appeal could not have been noted while awaiting the reasons for the order. Even if the failure to provide reasons deserves censure, it seems to me wholly unacceptable to wait over five months to note an appeal. Those in whose favour judgement is given are entitled to finality and a failure such as in the present case to prosecute an appeal within a reasonable time is unacceptable. Since there are no prospects of success on the merits the appeal therefore has to be struck off the roll.

[48] The respondents also raised two points *in limine*. The first being that it was improper for counsel for the applicants to have deposed to the affidavit in support of the condonation

application and, secondly, that the appellants cited only three of the applicants as respondents when there were four applicants in the proceedings *a quo*. In light of the conclusion to which I have come on the merits of the appeal in favour of the applicants, it becomes unnecessary for me to decide the points *in limine*.

Costs

[49] The default position is that costs must follow the result and I will make such an order.

Order

[50] In the result, I make the following orders:

- (i) The application for condonation for the late prosecution of the appeal is refused.
- (ii) The appeal is struck off the roll, with costs.



P T DAMASEB
ACTING JUSTICE OF APPEAL

I agree:



M H CHINHENGO
ACTING JUSTICE OF APPEAL

I agree:



N T MTSHIYA
ACTING JUSTICE OF APPEAL

FOR RESPONDENTS: ADV MASOEU

FOR APPELLANTS: ADV B SEKONYELA